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Supreme Court, U.S.
FILED

No. 99 272 AUG 16 1999

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LAWRENCE T. NEWMAN and BEVERLY R. NEWMAN,
Petitioners

vs.

CHARLES J. DEITER, PAUL COMMISKY, CHRISTOPHER SEIGEL, and MARION COUNTY SHERIFF,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

PETITION FOR WRIT OF CERTIORARI

WILLIAM E. DAILY
97 South Washington Street
Danville, Indiana 46122
(317) 745-4494
Counsel for Petitioners

5489

QUESTIONS PRESENTED

1. Judge Charles Deiter is not entitled to absolute judicial immunity because his illegal detention of the Newmans was not a judicial act and was done in the absence of all jurisdiction.

2. The International Covenant on Civil and Political Rights overrides the common law doctrine of absolute judicial immunity under the circumstances of this case.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding below:

Lawrence T. Newman and Beverly R. Newman,
Plaintiffs Below

Charles J. Deiter, Christopher Seigel, Paul Commisky, Marion County Sheriff,
Defendants Below

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Lawrence and Beverly Newman, the preadoptive parents of the minor child Laura Gail Rachael Clem ("Laura Clem" or "Laura"), respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals of Indiana affirming the decision of the Marion County Superior Court dismissing Judge Charles Deiter, the Marion County Sheriff, Christopher Seigel, and Paul Commisky as defendants in this case on the basis of absolute judicial immunity.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals is set forth in Appendix A. The opinion of the Indiana Supreme Court denying transfer is set forth in Appendix B. The order of the Marion County Superior Court dismissing Judge Charles Deiter is set forth in Appendix C. The order of the Marion County Superior Court dismissing the Marion County Sheriff, Christopher Seigel, and Paul Commisky is set forth in Appendix D.

JURISDICTION

This cause arises out of a case in which Judge Charles Deiter, judge of the Marion County [Indiana] Superior Court, Probate Division, Defendant below, ordered the illegal detention of Lawrence and Beverly Newman. The Marion County Sheriff, Christopher Seigel, and Paul Commisky, Defendants below, conspired with Judge Deiter and carried out Judge Deiter's order to effect the illegal detention.

The Newmans filed a state court action in the Marion Superior Court against Judge Deiter, Seigel, Commisky, and the Sheriff, alleging state tort claims of false imprisonment and civil conspiracy. Judge Deiter filed a motion to dismiss based in part upon absolute judicial immunity. The Sheriff, Seigel, and Commisky filed a motion for summary judgment based in part upon absolute judicial immunity.

The trial court granted Judge Deiter's motion to

dismiss on December 9, 1996 and it granted the motion for summary judgment of the Sheriff, Seigel, and Commisky, on June 30, 1997. Both motions were granted on the ground that Judge Deiter had absolute judicial immunity, and that said immunity devolved to the other Defendants.

Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1251(B)(3), and under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following Constitutional provision, the pertinent portion of which is set forth below:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. art VI.

STATEMENT OF THE CASE

This case comes before this Court as a result of the grant of a motion for dismissal in favor of Respondent Judge Charles J. Deiter, and the grant of a motion for summary judgment in favor of Respondents Christopher Seigel, Paul Commisky, and the Marion County Sheriff. If this case proceeds, the Newmans have alleged and intend to prove the following facts.

On March 29, 1993, Laura Clem was placed in the home of the Petitioners, Lawrence and Beverly Newman, in Indiana for the purposes of adoption through an interstate placement with Maryland. In March, 1994, a Maryland court issued an order calling for the return of Laura Clem to Maryland. The Maryland order was filed in the Marion County [Indiana] Probate Court, before Judge Charles J. Deiter, for the purpose of obtaining full faith and credit in

Indiana. On May 12, 1994, Judge Deiter issued an order granting full faith and credit to the Maryland order, and ordered the return of Laura Clem to Maryland. Judge Deiter later amended the order, which then required the Newmans to deliver Laura Clem to the office of The Children's Bureau of Indianapolis by 4:00 PM on May 27, 1994. The Newmans were involved in a hearing for a requested stay of the order before the Federal Court, which hearing was not completed until 6:00 PM on May 27, 1994. Judge Deiter informed the Newmans' attorney that Judge Deiter would not enforce his order until the completion of the Federal Court hearing. The Federal Court denied the stay, but The Children's Bureau was closed by then, and the Newmans had no way to deliver Laura Clem to its offices.

The Newmans then remained peaceably in their home, along with their attorney and many members of the media, anticipating that officers of Marion County Sheriff would come to their home to execute Judge Deiter's order and remove Laura Clem from their home. The media were prepared to film the seizure of 4-year-old Laura Clem from the Newman home by the Marion County Sheriff. The Newmans instructed their attorney to take Laura Clem peaceably outside and turn her over to the Marion County Sheriff, in full compliance with Judge Deiter's order, at such time as the Sheriff came to their home and requested the surrender of Laura Clem.

At 5:50 PM on May 27, 1994, Judge Deiter issued a Writ of Assistance to the Marion County Sheriff, authorizing the sheriff to use any and all force necessary to obtain Laura Clem from the Newman residence. Judge Deiter also secretly issued an order to appear for Beverly Newman, and an order to arrest Beverly Newman, which were filed with the court but never served on Beverly Newman.

At 10:00 PM on May 27, 1994, Christopher Seigel, the attorney for the Marion County Sheriff, and Paul Commisky, Sheriff's deputy, came to the Newman home and were immediately let in. They arrived hours after the Newmans' Sabbath had begun. Seigel and Commisky did not request the surrender of Laura Clem. Seigel stated that he did not have any legal papers with him, and that he only wanted to

talk. Seigel spent approximately one hour in the Newman home discussing the situation of endangerment to Laura Clem through deportation of her from the Newman home. At approximately 11:00 PM, Seigel suggested telephoning Judge Deiter at his office in order to arrange an "emergency (best interests) hearing" at which the Newmans could present to Judge Deiter evidence as to the best interests of Laura Clem, and illegalities committed by various agencies.

Seigel thereupon telephoned Judge Deiter at his office. Judge Deiter agreed to stay his removal order until the Newmans returned home after the "emergency hearing" to say goodbye to Laura in the event Judge Deiter did not modify his order. The Newmans would never have left their home without this agreement from Judge Deiter. The Newmans, their attorney, and Seigel then left the Newman home to travel to Judge Deiter's office. The Newmans left their home against their Jewish Sabbath prohibitions.

At no time when he was in the Newman home did Seigel make mention or request the Newmans to surrender Laura Clem. At no time did Seigel or Commisky inform the Newmans that the Sheriff had a Writ of Assistance, and at no time did Seigel, Commisky, or any other sheriff's deputies on the premises ever take any action to take Laura Clem into custody pursuant to the Writ of Assistance. Laura Clem was in full view and available to Seigel during the time he was in the Newman home. At no time did the Newmans impair or impede Seigel, or Commisky, or the Marion County Sheriff from enforcing the Writ of Assistance and from taking custody of Laura Clem.

Upon their arrival in Judge Deiter's office, the Newmans noticed many Marion County Sheriff's deputies in and around the office. Judge Deiter held the "emergency hearing" many hours after the normal court closing time, in his office, without his judicial robe, without the presence of the Worcester County Department of Social Services, (the Maryland agency which was Laura's guardian and which was seeking the enforcement of the Maryland court order) or its attorney, and without a court reporter. No evidence was taken, no witnesses were sworn in, and no record was made.

None of the indices of a court proceeding were present. Beverly Newman requested that Seigel be present, but he would not enter Judge Deiter's office. Judge Deiter made disparaging remarks about the Newmans' Jewish Holy Day, "Shavuos".

After approximately 45 mi utes, Judge Deiter announced to the Newmans that he was ordering Sheriffs to their home to take Laura Clem, and that the Newmans were not allowed to leave his office until after this was accomplished. Judge Deiter ordered two armed Marion County Sheriff's deputies to guard the inner entrance of his office so the Newmans could not leave his office. The Newmans were prohibited from communicating with the waiting media, despite their many requests to do so. The Newmans stated many times that they were being held illegally and denied the right to observe their Sabbath by being held hostage. When the Newmans questioned Seigel about Judge Deiter's promise to let them return home to say goodbye to Laura, he just shrugged his shoulders and grinned. Judge Deiter and the Sheriff's deputies refused to let the Newmans leave the office in order to talk to the media waiting downstairs in the City-County Building, even after Laura Clem had been seized from the Newman home

The Newmans were held prisoner in Judge Deiter's office under armed Marion County Sheriff's guard against their will for hours on May 27 through May 28, 1994. Beverly Newman announced the time in 3-5 minute intervals that Judge Deiter and the Sheriffs were holding them as hostages. The Newmans were released by Judge Deiter and the Sheriff's deputies at approximately 1:30 AM on May 28, 1994.

The Newmans were never held in contempt of court, nor were they ever served with an order to appear to show cause why they were in contempt of court or otherwise.

The "emergency hearing" orchestrated by Judge Deiter was not a legal court hearing at all, but in truth was a ruse and a set-up to lure the Newmans into Judge Deiter's office so that they could be held prisoner against their will. Judge Deiter

orchestrated the set-up in conjunction with an interstate conspiracy that included Seigel. The purpose of the "emergency hearing" was to lure the Newmans to Judge Deiter's office so that they could be held against their will at a distant location while Laura Clem was seized from their home in the middle of the night. This action was taken in order to prevent media exposure of Laura Clem being seized from the Newmans' arms during Indianapolis 500 weekend. This action was taken in the middle of the night in the hopes that the media would have left the Newman home by then, after the television and newspaper deadlines had passed. The "emergency hearing" was nothing more than a sham in order to put into force a calculated plan to discriminate against the Newmans on the basis of their religion and to control the media coverage of a State-sanctioned midnight kidnapping of a young child.

The Newmans filed a state court action in the Marion Superior Court against Judge Deiter, Seigel, Commisky, and the Sheriff, alleging state tort claims of false imprisonment and civil conspiracy. The trial court dismissed all claims against these Defendants on the basis of absolute judicial immunity.

The Newmans challenged the applicability of common law absolute judicial immunity in the trial court, in the Indiana Court of Appeals, and in the Indiana Supreme Court. The Newmans raised the issue of international law as a bar to the application of absolute judicial immunity in the Indiana Court of Appeals and the Indiana Supreme Court, citing the International Covenant on Civil and Political Rights ("ICCPR").

The Newmans timely pursued the appeal which is the subject of these proceedings. On December 10, 1998, the Indiana Court of Appeals affirmed the judgments of the Marion Superior Court. The Court of Appeals ruled that absolute judicial immunity applied to Judge Deiter, the Sheriff, Seigel, and Commisky. The Court of Appeals stated that it would not decide whether international law provided the Newmans with a cause of action against Judge Deiter for false imprisonment regardless of the existence of judicial immunity, but ruled that even assuming the ICCPR applied to this

situation and gave the Newmans a cause of action, the treaty would not override judicial immunity. On May 17, 1999, the Indiana Supreme Court denied transfer.

REASONS FOR GRANTING THE WRIT

I. Judge Charles Deiter is not entitled to absolute judicial immunity because his illegal detention of the Newmans was not a judicial act and was done in the absence of all jurisdiction.

Certiorari should be granted to determine the critical issue of the limits of jurisdiction of the judge of a court of limited jurisdiction when the defense of absolute judicial immunity is asserted. The controlling cases which have considered the applicability of absolute judicial immunity, including *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 20 L.Ed. 646 (1872), *Stump v. Sparkman*, 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978), and *Mireles v. Waco*, 502 U.S. 9, 116 L.Ed.2d 9 (1991), 112 S.Ct. 286, all concerned courts of general jurisdiction, in which the judges had expansive jurisdictional authority. See *Stump v. Sparkman*, 435 U.S. at 359, "Because the court over which Judge Stump presides is one of general jurisdiction, neither the procedural errors he may have committed nor the lack of a specific statute authorizing his approval of the petition in question rendered him liable in damages for the consequences of his actions," and 435 U.S. at 362, "State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors ...."

When a court's jurisdiction is limited, however, the "outer limits" of a judge's jurisdiction shrink, rendering the judge less immune from suit on the basis of absolute judicial immunity, since the judge is more likely to have acted outside of his jurisdiction. This is such a case. The illegal actions taken by Judge Deiter against the Newmans were outside of Judge Deiter's lawful jurisdiction, and they were not judicial acts, and therefore, absolute judicial immunity does not apply to Judge Deiter.

The trial court ruled that Judge Deiter was immune from suit based on the common law concept of absolute judicial immunity. As a general rule, a judge possesses absolute immunity from suit for actions taken in his judicial capacity. *Forrester v. White*, 484 U.S. 219,225 (1988); *Stump v. Sparkman*, 435 U.S. 349, 355-356 (1978). The determination of whether a judge has acted in his judicial capacity depends upon the nature of the action itself, meaning whether the function is normally performed by a judge, and upon the expectations of the parties, meaning whether the parties understood they were dealing with the judge in his judicial role. *Stump*, 435 U.S. at 362. "[T]he informal and ex parte nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character. (emphasis added)." *Forrester*, 484 U.S. at 227. A "judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' (emphasis added)" *Stump*, 435 U.S. at 356-57 (quoting *Bradley v. Fisher*, 13 Wall. 35 (1872)).

The inquiry into the powers vested in Judge Deiter establishes that Judge Deiter acted entirely outside of his jurisdiction in the actions that he took against the Newmans. Judge Deiter was sued for false imprisonment of the Newmans and with joining other persons in a civil conspiracy to falsely imprison the Newmans. In each case, Judge Deiter acted entirely outside of his jurisdiction by falsely imprisoning the Newmans and in conspiring with other persons to falsely imprison the Newmans.

In 1994, Judge Deiter was the duly-appointed judge of the Marion Superior Court, Probate Division. Pursuant to IND.CODE §33-5-35.1-25, as in effect in 1994, Judge Deiter's jurisdiction was limited only to those matters which are permitted by law to be conducted by a probate judge.

IND.CODE §33-5-35.1-4(a)(2), as in effect in 1994, granted only the following limited jurisdiction to the Marion Superior Court, Probate Division:

> Original and exclusive jurisdiction in all matters pertaining to the probate and settlement of decedents' estates, trusts, and guardianships, the probate of wills, proceedings to resist the probate of wills, and proceedings to contest wills, the appointment of guardians, assignees, executors, administrators, and trustees and the administration and settlement of estates of protected persons (as defined in IC 29-3-1-13) and deceased persons, and of trusts, assignments, adoptions, and surviving partnerships, and all other probate matters.

In addition, the Marion Superior Court had certain general powers of a court, as set forth in IND.CODE §33-5-35.1-6 and IND.CODE §33-5-35.1-7, as in effect in 1994:

> **IC 33-5-35.1-6. Powers of court.** - The court shall have full power to adopt rules and regulations for conducting the business of the court. The court shall have all the powers incident to a court of record in relation to the attendance of witnesses, the punishment of contempts, and the enforcement of its orders. The judges shall have the full authority to administer oaths, solemnize marriages, take and certify acknowledgments of deeds, and all legal instruments, and to give all necessary certificates for the authentication of the records and proceedings in the court.

> **IC 33-5-35.1-7. Power to transact business of court.** - The court shall have the same power to grant restraining orders, injunctions and writs of ne exeat, to issue writs of habeas corpus, to appoint receivers, masters, and commissioners to convey real property, and to grant commissions for the examination of witnesses, and to appoint other officers necessary to transact the business of the court.

Judge Deiter's false imprisonment of the Newmans was completely outside of any of the limited jurisdiction which he had been granted by statute. The power of a judge to

enforce his orders or to punish contempts does not give the judge power to commit illegal acts in order to enforce his orders. The facts as alleged in the Complaint establish that Judge Deiter was not acting in furtherance of any of his orders in holding the Newmans against their will in his office, because the Newmans had never attempted to resist any orders of the judge.

The Newmans anticipated that the Marion County Sheriff would come to their home on May 27, 1994, in order to execute Judge Deiter's order to remove Laura Clem, and the Newmans instructed their attorney to deliver Laura Clem to the Sheriff upon request for her surrender. When representatives of the Marion County Sheriff came to the Newmans' home, the representatives did not ever request the surrender of Laura Clem. Instead, Christopher Seigel, attorney for the Marion County Sheriff, telephoned Judge Deiter from the Newmans' home at 11:00 PM.

Had Judge Deiter wanted to act within his jurisdiction in order to enforce his removal order, Judge Deiter's course was clear when he received the telephone call from Christopher Seigel. Judge Deiter would simply have insisted that the Marion County Sheriff enforce his order and immediately take custody of Laura Clem. The Sheriff's representatives were already in the Newmans' home; Laura Clem was visible and readily available to the Sheriff's representatives; the Newmans had instructed their attorney to cooperate fully with the Sheriff. Had Judge Deiter taken the legal course of action, Laura Clem would have been removed from the Newmans' custody pursuant to Judge Deiter's removal order, the Newmans would have peaceably remained in their home, and none of the ugly and illegal events which later transpired would have occurred.

But Judge Deiter did not even mention to Christopher Seigel in the 11:00 P.M. telephone call that the Marion County Sheriff should enforce his order to remove Laura Clem. Instead, Judge Deiter, along with the Marion County Sheriff, Christopher Seigel, and Paul Commisky, embarked on a scheme the purpose of which was to illegally detain the Newmans outside of their home, in order to illegally

discriminate against the Newmans on the basis of their religion by forcing them to break their Sabbath, deny the Newmans their First Amendment rights to media access, and to seize Laura Clem in the early hours of the morning without any media present. In order to accomplish these goals, Judge Deiter conspired with the Marion County Sheriff, Seigel, Commisky, and others to lure the Newmans out of their home late at night, after the Newmans' Sabbath had begun, for the purpose of illegally detaining them in Judge Deiter's office, away from the media, while Laura Clem was taken from the Newman home.

Once in Judge Deiter's office, the Newmans were illegally held against their will by Judge Deiter and the Marion County Sheriff's deputies. Judge Deiter had no jurisdiction to hold the Newmans hostage in his office. Such action was not taken in furtherance of any of Judge Deiter's judicial orders. Laura Clem was nearly 10 miles from the Newmans, and the Newmans had no car to return home. Judge Deiter's false imprisonment of the Newmans was an intentional tort for which there is no judicial immunity.

The recent U.S. Supreme Court cases of *Stump v. Sparkman*, 435 U.S.349 (1978) and *Mireles v. Waco*, 502 U.S. 9 (1991) control here, and support the finding that Judge Deiter acted wholly without jurisdiction. In *Mireles*, a judge "'angered by the absence of attorneys from his courtroom, ordered the police officer defendants 'to forcibly and with excessive force seize and bring [a public defender] into his courtroom.'" *Mireles*, 502 U.S. at 10. This Court emphasized that a judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge, citing the Cal. Civ. Proc. Code Ann. *Mireles*, 502 U.S. at 12.

Citing *Stump*, this Court stated that:

> the relevant inquiry is the "nature" and "function" of the act, not the "act itself." 435 U.S., at 362. In other words, we look to the particular act's relation to a general function normally performed by a judge, in this case the function of directing police officers to bring

counsel in a pending case before the court.

In *Mireles*, it is a normal function of a judge to direct officers to bring counsel to the court while court is in session and pending cases are before the court. In the case at bar, however, the actions taken by Judge Deiter against the Newmans in the late night hours of May 27-28, 1994, were not related to a general function performed by a judge. It is not the general function of a judge to be in his office at 11:00 PM on a Friday night, some 6 1/2 hours after the court has officially closed for the day and all courthouse staff have left the premises. It is not the general function of a judge to lure litigants to his office late at night with the promise of a hearing which the judge never intended to take place and which in fact did not take place.

The Newmans alleged that the "best interests hearing" arranged by Judge Deiter on May 27, 1994, was nothing but a sham, that a judicial proceeding did not take place, nor was it ever intended by Judge Deiter to take place, and for purposes of a motion to dismiss, this allegation must be taken to be true. Therefore, the analysis is not whether a judge can hold persons against their will during a judicial proceeding without the legal procedures of a contempt proceeding being followed. Rather, the analysis concerns whether a judge can lure persons to his office with the promise of a judicial proceeding, solely as a pretext for obtaining control over the persons, never actually hold the promised judicial proceeding, and then falsely imprison the persons.

While Judge Deiter may have had the judicial power to order the removal of Laura Clem from the Newmans' home, and while Judge Deiter may have had the power to direct sheriff's deputies after midnight on May 28, 1994, to execute his previous order to remove Laura, such power did not transform Judge Deiter's separate action in holding the Newmans hostage into a judicial act.

Judge Deiter issued two separate commands in the early morning hours of May 28, 1994. His first command was to certain sheriff's deputies to obtain Laura Clem from the Newman home. The fact that this order may have been taken

in a judicial capacity does not clothe Judge Deiter's second order with the cloak of a judicial act. Judge Deiter's second, and separate, order was for other sheriff's deputies to hold the Newmans against their will in his office. Ordering a false imprisonment has no relation to a function normally performed by a judge. While the order to seize Laura Clem may have been done in a judicial capacity, the separate order to hold the Newmans against their wills was not done in a judicial capacity.

There are fundamental differences between the facts in *Mireles* and the instant case which compel a finding that Judge Deiter cannot claim judicial immunity. In *Mireles*, the judge certainly had the power to compel the attendance of an attorney in open court, and no one would argue that the judge's order to the sheriff to bring a public defender into court was not a judicial act. The contention arose with respect to the manner and degree by which the judge so ordered the sheriff - to act "forcibly and with excessive force." This Court ruled that the manner and degree of the act ordered - though illegitimate - did not transform an otherwise judicial act into a non-judicial act.

In contrast, Judge Deiter's order to hold the Newmans against their wills was not a matter of manner and degree. Judge Deiter's order to detain the Newmans was, in and of itself, outside of his judicial power. Had Judge Deiter ordered the Newmans to be held for a shorter period of time, or with less force, such would not have transformed his non-judicial act into a judicial act. The order to hold the Newmans was not a judicial act and was outside of Judge Deiter's jurisdiction, and no adjustment of manner and degree could change that fact.

The pre-*Mireles* case of *Yates v. Village of Hoffman Estates, Illinois*, 209 F.Supp. 757 (N.D.Ill, E.D. 1962) is supported by the *Mireles* analysis, and demonstrates how Judge Deiter acted without jurisdiction in this case. In *Yates*, the plaintiff alleged that a magistrate had issued a warrant charging plaintiff's employer with violation of an ordinance, but directed the police to arrest the plaintiff even though the plaintiff was not named in the warrant and was not charged with any offense. The court held that the magistrate did not

have immunity. The court's reasoning was twofold. First, it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the courthouse. Second, it is not a judicial function for a magistrate to direct a police officer to arrest and to take into custody a person not named in a warrant. *Yates*, at 759.

The *Yates* decision revolved around the issue of what constitutes a judicial function. Judicial immunity can be overcome in either of two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. *Mireles*, 502 U.S. at 11. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. Id., at 12. In *Yates*, the District Court considered only the first test, and concluded that the magistrate involved was not cloaked with judicial immunity for his act of directing a police officer to arrest and take into custody a person not named in a warrant. *Yates*, 209 F.Supp. at 759.

The *Yates* court further held:

> However, not every action by a judge is in exercise of his judicial function. For example, it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the courthouse.

The present case is very similar to the situation in *Yates*. Judge Deiter committed an intentional tort against the Newmans by having them confined against their will. Under Indiana law, the actions by Judge Deiter constituted false imprisonment, an intentional tort. Judge Deiter's confinement of the Newmans was not pursuant to any judicial act within his jurisdiction as a probate court judge. Judge Deiter had no jurisdiction to order the criminal arrest of the Newmans. While Judge Deiter did possess contempt power, the confinement of the Newmans was not pursuant to any contempt proceeding. Contempt was never mentioned by Judge Deiter, and the Newmans were never even charged with contempt.

Judge Deiter did not follow any of the statutory

requirements for finding a person in contempt prior to the time that he ordered the Newmans to be held against their will. IND.CODE §34-4-7-3 states in pertinent part:

> Every person who shall be guilty of any willful disobedience of ... any order lawfully issued by any court ... shall be guilty of an indirect contempt of the court....

IND.CODE §34-4-7-4 states in pertinent part:

> Every person who shall willfully resist, hinder or delay the execution of any lawful process, or order of any court of record shall be guilty of an indirect contempt of said court; ....

IND.CODE §34-4-7-8 sets forth the exclusive method for charging a person with indirect contempt:

> In all cases of indirect contempts, the person charged therewith shall be entitled, before answering thereto, or being punished therefor, to have served upon him a rule of the court, against which the alleged contempt may be committed; which said rule shall clearly and distinctly set forth the facts which are alleged to constitute such contempt; and shall specify the time and place of such facts which are alleged to constitute such contempt; and shall specify the time and place of such facts with such reasonable certainty, as to inform the defendant with the nature and circumstances of the charge against him; and shall specify a time and place at which he is required to show cause, in said court, why he should not be attached and punished for such contempt, which time the court shall, on proper showing, extend so as to give the defendant a reasonable and just opportunity to purge himself of such contempt. No such rule as hereinbefore provided for, shall ever issue until the facts, alleged therein to constitute such contempt, shall have been brought to the knowledge of the court by an information, duly verified by the oath of affirmation of some officers of the court, or other responsible person.

IND.CODE §34-4-7-9, which sets forth the lawful procedure for determining whether a contempt of court has been committed, states in pertinent part:

> If the defendant shall fail to appear in said court ... or ... the defendant shall fail or refuse to answer ... the court may proceed at once, and without any further delay, to attach and punish him or her for such contempt; but if the defendant shall answer to the facts set forth in such rule ... the court shall acquit and discharge the defendant ....

IND.CODE §34-4-7-10 states in pertinent part:

> The provisions of this chapter shall apply to all proceedings for contempt in all courts of record in this state except the supreme court thereof ....

The jurisdiction of a court to punish for an indirect contempt of its authority in disobeying an order can only be invoked by the filing of an affidavit. *Ramer v. State*, 190 Ind. 124, 128 N.E. 440,442 (1920); *Snyder et al. v. The State*, 151 Ind. 553,555, 52 N.E. 152 (1898). A proper motion or petition must be filed in order to invoke the court's jurisdiction for a contempt proceeding. *Lane v. Campbell*, 214 Ind. 376, 14 N.E.2d 552,555 (1938); *Oakland Coal Co. v. Wilson*, 196 Ind. 501,506, 149 N.E. 54 (1925). Since Judge Deiter did not follow any of the legal requirements for finding a person in contempt of court, he did not have jurisdiction over the Newmans for the purpose of confining them due to contempt, and Judge Deiter was therefore acting in the clear absence of all jurisdiction over the Newmans when he falsely imprisoned them.

The confinement of the Newmans was not done to enforce Judge Deiter's order to remove Laura Clem. Laura Clem could have been removed from the Newmans' custody at any time that the sheriff's representatives were in the Newman home, or after the Newmans had left their home to go to Judge Deiter's office, without resort to holding the Newmans hostage.

Further, Judge Deiter had issued a secret order to arrest Beverly Newman on May 27, 1994, prior to the time that the Newmans came to his office, but unbeknownst to the Newmans and their attorneys. Judge Deiter clearly had no jurisdiction to issue a secret order or to order the arrest of Beverly Newman and hold her against her will. The jurisdiction of a probate court judge does not include the power to issue arrest warrants, which involve criminal matters. IND.CODE §§ 33-5-35.1-4(a)(2), 33-5-35.1-6, and 33-5-35.1-7. There is a clear absence of jurisdiction when a court of limited jurisdiction attempts to adjudicate a case outside of its jurisdiction, such as when a probate court conducts a criminal trial. *Mann v. Conlin*, 22 F.3d 100,104 (6th Cir. 1994).

As set forth above, Judge Deiter's action in falsely imprisoning the Newmans was not done in his judicial capacity, and was done in clear absence of any jurisdiction. Thus, Judge Deiter should not be granted judicial immunity.

II. The International Covenant on Civil and Political Rights overrides the common law doctrine of absolute judicial immunity under the circumstances of this case.

Even if it is found that Judge Deiter should normally enjoy a common law immunity for his false imprisonment of the Newmans, international law requires that the Newmans be afforded the opportunity to litigate on the merits their claims of false imprisonment against Judge Deiter, irrespective of any immunity otherwise applicable to judges under common law. The International Covenant on Civil and Political Rights ("ICCPR"), a multi-lateral treaty, was ratified by the United States on June 8, 1992, and the treaty entered into force for the U.S. on September 8, 1992. G.A.res.2200A (XXI), 21 U.N.GAOR Supp.(No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. The ICCPR, pursuant to the treaty provisions of the United States Constitution, provides the Newmans with the right of action against Judge Deiter. Certiorari should be granted in order to determine the important issue of the primacy of the ICCPR's provisions over the application of common law absolute

judicial immunity.

The ICCPR provides in pertinent part:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.
>
> ICCPR, Part II, Article 2.

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law ....
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
>
> ICCPR, Article 9.

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.
>
> ICCPR, Article 17.

> 1. Everyone shall have the right to freedom of thought, conscience and religion.
>
> ICCPR, Article 18.

1. Everyone shall have the right to freedom of association with others....
ICCPR, Article 22.

In its Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, CCPR/C/79/Add.50, April 7, 1995, the United Nations Human Rights Committee made the following statements with regard to the adherence of the United States to the ICCPR:

11. The Committee takes note of the position expressed by the delegation that, notwithstanding the non-self-executing declaration of the United States, courts of the United States are not prevented from seeking guidance from the Covenant in interpreting United States law.

34. .... Appropriate measures should be adopted to provide speedy and effective remedies to compensate persons who have been subjected to unlawful or arbitrary arrest as provided in article 9, paragraph 5, of the Covenant.

The treaty power of the United States is set forth in Article 6 of the United States Constitution, which states in pertinent part:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

A treaty, being part of the supreme law of the land, controls the statutes and the common law of the states whenever the treaty differs from them. *De Geofroy v. Riggs*, 133 U.S. 258,267, 10 S.Ct. 295, 33 L.Ed. 642 (1889). With the exceptions of authorizing what the Constitution forbids, or a change in the character of the government, or cession of a

state's territory without its consent, there is no limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Id.*, at 133 U.S. 267.

In Indiana, the common law was adopted when the state was yet a territory, and has been in effect since the state's admission to the Union, except as limit by treaties, constitutions, and statutes. *State v. Ellis*, 184 Ind.307, 112 N.E. 98,100 (1916). Treaties are a part of the supreme law of the land, and state laws must give way to treaties made by the federal government. *Lehman v. State*, 45 Ind.App. 330, 88 N.E. 365,367 (1909). This Court has never suggested that the precise contours of official immunity should be slavishly derived from the often arcane rules of the common law. *Anderson v. Creighton*, 483 U.S. 635,645, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Thus, the traditional common law rule of judicial immunity is subject to the terms of treaties entered into by the United States, including the International Covenant on Civil and Political Rights.

Further, the courts must apply the terms of treaties in deciding cases before them. This rule was set down by the United States Supreme Court and by the Indiana Supreme Court in some of the earliest cases before them. A treaty is the law of the land, and as such affects the rights of parties litigating in court, and that treaty as much binds those rights and is as much to be regarded by the court as an act of Congress. *United States v. Schooner Peggy*, 1 Cranch 103,110, 2 L.Ed. 49 (1801). Treaties with foreign nations being a part of the law of the land, the courts are bound to take notice of them. *Baby v. Dubois*, 1 Blackf. 255 (1823).

There is no question that a treaty, such as the International Covenant on Civil and Political Rights, can confer private rights which are enforceable in the courts. This Court laid down this principle as far back as 1884 in the Head Money Cases, *Edye v. Robertson*, 112 U.S. 580,599, 5 S.Ct. 247, 28 L.Ed. 798 (1884):

> But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the

> Nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found, in treaties which regulate the mutual rights of citizens and subjects of the contracting Nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "This Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute.

This Court has recognized that the enforceability of the ICCPR is a question which is open to be decided by the courts, and this Court has not yet decided this issue. *United States v. Balsys*, 524 U.S. 666, 118 S.Ct. 2218,2234 141 L.Ed.2d 575 (1997). Some lower courts have determined that the ICCPR regulates internal legal procedures in the United States, while other courts have taken the opposite view, leaving this vital issue ripe for review and determination by this Court. See *United States v. Benitez*, 28 F. Supp.2d 1361,1364 (S.D. Fla. 1998), which determined that the ICCPR regulates the internal criminal procedure of the United States; *Martinez v. City of Los Angeles*, 141 F.3d 1373,1384 (9th Cir. 1998), which determined that the ICCPR sets forth a clear international prohibition against arbitrary arrest and detention which is recognized by the United States; and *United States v. Bakeas*, 987 F.Supp 44,46 (Mass. 1997), which recognized that the Bureau of Prison's policy of assigning aliens to more restrictive conditions of confinement solely by reason of their alienage "may violate this nation's commitments" under the ICCPR. Contra, see *White v.*

Paulsen, 997 F. Supp. 1380 (E.D. Wash. 1998) and *Heinrich v. Sweet*, 1999 U.S. Dist. LEXIS 6669 (Mass. 1999).

In the present case, the ICCPR grants individual rights to the Newmans which can be enforced in a court of law. With respect to the claims against Judge Deiter, the ICCPR specifically requires that the Newmans have an effective remedy for the violations of their rights caused by Judge Deiter's actions in holding the Newmans against their will, and that the Newmans have an enforceable right to compensation from Judge Deiter as a result of his unlawful detention of the Newmans. ICCPR, Article 9.

The Newmans do not suggest that the ICCPR abolishes the long-settled principle of absolute judicial immunity in the United States. Rather, the ICCPR carves out a narrow exception to the general rule of absolute judicial immunity, solely in cases of unlawful arrest or detention. ICCPR, Article 9. In such cases, the ICCPR guarantees that the detainee has the right to compensation. In the particular situation where a judge has illegally arrested or detained a person, international law as set forth in the ICCPR overrides the claim of absolute judicial immunity, and imposes on the judge the liability of compensating the victims of his illegal detention. In this case, Judge Deiter's illegal arrest of Beverly Newman, and his illegal detention of the Newmans, subject Judge Deiter to liability by the terms of the ICCPR, irrespective of any absolute judicial immunity that might otherwise apply.

That the shield of immunity should not be available to Judge Deiter in this case is the expression of the current laws of nations and the norms of international law. These laws ensure the universally-agreed-upon human rights and codes of ethics of nations established by the world's conscience across nations across time. The maxims that governmental officials can be held personally responsible for their acts were expressed as far back as the Nuremberg Trials following World War II. As set forth in Article 7 of the Charter of the International Military Tribunal, created in 1945 to punish war criminals:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

The judgment of the International Military Tribune states:

> The Charter is not an arbitrary exercise of power on the part of the victorious nations, but is the expression of international law existing at the time of its creation.

CHIEF JUDGE WALTER B. BEALS, THE FIRST GERMAN WAR CRIMES TRIAL, 15, 16, 71 (W. Paul Berman, ed., 1985).

Each individual judge acting in violation of the world's conscience and universally accepted codes of conduct cumulatively created the Holocaust. The weight of the world's conscience, as established in international law and legal precedent on a local, national, and global scale for centuries, flies against the acts of Judge Deiter. The Holocaust was the cumulative result of each individual's willingness to violate the world's conscience, believing that there would be no sanctions. From this emanate the Nuremberg Trial decisions, the Charter of the International Military Tribunal, and the principles of law within the ICCPR.

What is the message of an individual in authority who violates universal principles of law and receives no legal sanctions for his intentional transgressions? International law is a mockery if there are no sanctions for violating the world's conscience.

The United States has historically taken a leadership role in international human rights. A bedrock of the American judicial system is that its judges must avoid even the appearance of impropriety. If the citizens of the United States cannot hold a judge to a bare minimum standard of personal liability for the illegal detention of American citizens, then the American judicial system has lost its credibility, reputation, and dignity, both with the American public and on the worldwide stage.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William E. Daily
97 South Washington Street
Danville, Indiana 46122
(317) 745-4494
Counsel for Petitioners

Dated: August 13, 1999

APPENDIX A

217 STATE HOUSE
INDIANAPOLIS, IN 46204

H. JOHN OKESON
CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

(317) 232-1930
FAX (317) 232-8365

Cause Number
49A04-9710-CV-00448
Lower Court Number:
49D059605CP717

NEWMAN, LAWRENCE T., -V- DEITER, CHARLES J.

You are hereby notified that the COURT OF APPEALS has on this day 12/10/98 ISSUED THE ENCLOSED OPINION:

WITNESS my name and the seal of said Court,
this 10th day of DECEMBER, 1998

s/ H. John Okeson
Clerk Supreme Court, Court of Appeals and Tax Court

FOR PUBLICATION

ATTORNEY FOR APPELLANT:

WILLIAM E. DAILY
Danville, Indiana

ATTORNEY FOR APPELLEE:

ELLEN WHITE QUIGLEY
PETER A. SCHROEDER
Indianapolis, Indiana

DALE R. SIMMONS
Indianapolis, Indiana

JEFFREY A. MODISETT
Attorney General of Indiana

JON B. LARAMORE
Deputy Attorney General

IN THE COURT OF APPEALS OF INDIANA

LAWRENCE T. NEWMAN, and
BEVERLY R. NEWMAN,
Appellants-Plaintiffs,

vs.

CHARLES J. DEITER,
PAUL COMMISKEY,
CHRISTOPHER SEIGEL,
MARION COUNTY SHERIFF, and
MICHAEL BISHOP,
Appellees-Plaintiffs.

No. 49A04-9710-CV-448

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49D05-9605-CP-0717

December 10, 1998

OPINION - FOR PUBLICATION

RATLIFF, Senior Judge

STATEMENT OF THE CASE

Plaintiffs-Appellants Lawrence T. Newman and Beverly R. Newman (the "Newmans") appeal the trial court's order granting summary judgment in favor of Defendants-Appellees Christopher Seigel, Paul Commiskey, and the Marion County Sheriff (hereinafter collectively referred to as the "Sheriff"). The Newmans also appeal the trial court's order granting the motions to dismiss of Defendants-Appellees Charles J. Deiter ("Judge Deiter") and Michael Bishop ("Bishop").

We affirm.[1]

ISSUES

The Newmans raise three issues which we restate as:

I. Whether the trial court committed reversible error by finding that Judge Deiter was entitled to absolute judicial immunity and granting Judge Deiter's motion to dismiss pursuant to Ind. Trial Rule 12(B)(6).

II. Whether the trial court committed reversible error by granting the Sheriff's motion for summary judgment.

III. Whether the trial court committed reversible error by granting Bishop's motion to dismiss pursuant to Ind. Trial Rule 12(B)(6).

[1]We note that thus far the Newmans have unsuccessfully prosecuted two appeals to this court involving the same factual situation as is involved in the case at bar. *See In the Matter of the Adoption of L.C.*, 650 N.E.2d 726 (Ind.Ct.App. 1995), *reh'g. denied, trans. denied, cert. denied,* 116 S.Ct. 1423, 134 L.Ed.2d 547, and *In the Matter of L.C.*, 659 N.E.2d 593 (Ind.Ct.App. 1995) *reh'g. denied, trans. denied, cert. denied,* 117 S.Ct. 2515, 138 L.Ed.2d 1017. The Newmans have also unsuccessfully prosecuted a § 1983 action in federal court involving the same set of facts. *See Newman v. State of Indiana, et al.*, 129 F.3d 937 (7th Cir. 1997). This case is the latest chapter in the long history of the Newmans' attempts to adopt a child.

FACTS AND PROCEDURAL HISTORY

In 1991, the Newmans contacted the Children's Bureau of Indianapolis ("CBI"), an adoption agency, about the possibility of locating a child for adoption. In 1992, the Newmans became aware that a group of children, in Worcester County, Maryland, who were under the guardianship of Worcester County Department of Social Services ("WCDSS") were available for adoption. In March of 1993, CBI was advised by WCDSS that the Newmans had been selected as prospective adoptive parents for the children, a girl, L.C., and twin boys, R.C. and M.C. WCDSS entered into an Interstate Compact Placement Agreement with the Family Protection and Development Bureau of the Indiana State Division of Family and Children, and CBI was approved as the local agency to supervise the placement of the children in Indiana.

Later in 1993, R.C. and M.C. were returned to Maryland prior to adoption due to difficulties associated with the placement. However, the Newmans notified the WCDSS caseworker that they wanted to adopt L.C. WCDSS filed a petition in the Circuit Court of Worcester County, Maryland, requesting the immediate return of L.C. to the custody of WCDSS. In March 1994, the Maryland court issued an order calling for the return of L.C. to Maryland. The Maryland order was filed in the Marion County Probate Court, before Judge Deiter, for the purpose of obtaining full faith and credit of that order. Bishop, who represented CBI, was retained by WCDSS for representation in Indiana.

On April 13, 1994, the Newmans filed a petition to adopt L.C. in the Marion County Superior Court, Probate Division. On April 22, 1994, the WCDSS filed its motion to contest the adoption, and the matter was set for a hearing.

On May 12, 1994, Judge Deiter issued an order granting full faith and credit to the Maryland order, and ordered the return of L.C. to Maryland. That order was subsequently amended to provide that the Newmans deliver L.C. to CBI by 2:00 p.m. on May 27, 1994. Judge Deiter's order was

affirmed on appeal, and is reported as *In the Matter of L.C.*, 659 N.E.2d 593 (Ind.Ct.App. 1995), *reh'g. denied.*

On May 27, 1994, the Newmans were involved in a hearing in federal court for a stay of Judge Deiter's order. That hearing was not completed until 6:00 p.m. Judge Deiter informed the Newmans' attorney that he would not enforce the order until completion of the federal court hearing. The federal court denied the Newmans' request for a stay. By that time CBI's offices were closed, so the Newmans returned home.

At 5:50 p.m. on May 27, 1994, Judge Deiter issued a Writ of Assistance to the Sheriff, authorizing the Sheriff to use any and all force necessary to obtain L.C. from the Newmans. The order provided that the sheriff was "authorized to arrest any person and bring him or her to this Court to show cause why he or she should not be punished for contempt, and to hold such person until Court is in session." (R. 151).

At 10:00 p.m. that same day, Christopher Seigel, attorney for the Marion County Sheriff, and Paul Commisky, Sheriff's Deputy, came to the Newmans' home. They did not request the surrender of L.C. at that time, but Seigel discussed that issue with the Newmans and their attorney for approximately an hour. There is conflicting evidence about who made the request, but the Newmans' complaint alleges that at approximately 11:00 p.m. Seigel suggested calling Judge Deiter at his office to arrange an emergency "best interests" hearing. Seigel then called Judge Deiter and arranged for the hearing. Judge Deiter agreed to stay his removal order until the Newmans could return home and have a few minutes with L.C. before she was removed, if they did not succeed at the hearing. The Newmans, their attorney, and Seigel left the Newmans' home to attend the hearing. No one from CBI or WCDSS was present at the hearing.

Judge Deiter held the hearing in his office. According to the complaint, no court reporter was present, no witnesses were sworn and no record was made of that hearing. After approximately 45 minutes, Judge Deiter announced to the Newmans that he was ordering the Sheriff to their home to

remove L.C., and that they were not allowed to leave his office until this was accomplished. Judge Deiter, in an affidavit submitted to the trial court in response to the Newmans' motion to correct errors, stated that he did this because Mrs. Newman appeared to be visibly agitated and emotionally unstable, Mrs. Newman's statements led Judge Deiter to believe that she would not voluntarily give up the child, and the Newmans would attempt to prevent removal of L.C., thereby creating an emotionally upsetting scene at their home. Judge Deiter further stated that he believed it to be in L.C.'s best interest for the Sheriff to remove L.C. from the Newmans' home immediately. Judge Deiter ordered two deputies to guard the inner and outer areas of his office to prevent the Newmans from leaving.

L.C. was removed from the Newmans' home, and after waiting approximately an hour and a half for that to be accomplished, the Newmans were allowed to leave Judge Deiter's office.

On June 7, 1994, Judge Deiter, after hearing the Newmans' petition to adopt L.C., denied the petition. The Newmans appealed this decision, which was affirmed and is reported as *In the Matter of the Adoption of L.C.*, 650 N.E.2d 726 (Ind.Ct.App. 1995).

On May 23, 1996, the Newmans filed a complaint against various defendants.[2] This complaint is 62 pages in length and

[2]The Seventh Circuit Court of Appeals described the Newmans' § 1983 complaint as follows: A married couple in Indiana, disappointed in their efforts to adopt a Maryland child, have brought a hopeless suit against 54 named, and many unnamed, agencies, officials, and private persons in Indiana and Maryland. The complaint, most of which the district court dismissed on the pleadings (certifying these rulings for immediate appeal under Fed.R.Civ.P. 54(b)), alleges in great detail a far-reaching and implausible conspiracy to prevent the Newmans, by reason of their being Jewish, from adopting Jewish (or, we suppose, any other) children. *Newman v. State of Indiana, et al.*, 129 F.3d 937 (7th Cir. 1997).

names many state agencies and officials from Indiana and Maryland as defendants. Judge Deiter, Bishop and the Sheriff are the only defendants who are parties to this appeal. Judge Deiter filed a motion to dismiss and memorandum in support thereof on July 15, 1996. Bishop filed a motion to dismiss and memorandum in support thereof on August 15, 1996. A hearing was held on November 25, 1996, and all motions to dismiss were taken under advisement. On December 9, 1996, the trial court granted the motions to dismiss filed by Bishop and Judge Deiter. On December 11, 1996, the Sheriff filed a motion for summary judgment and memorandum in support thereof. On January 7, 1997, the Newmans filed a motion to correct errors and memorandum in support thereof. On January 24, 1997, Judge Deiter filed his objection to the Newmans' motion to correct errors in which he invited the trial court to convert his motion to dismiss into a motion for summary judgment. On March 3, 1997, the trial court granted the Newmans' request for entry of separate judgment under T.R. 54(B). On March 27, 1997, the Newmans filed a motion to correct errors and memorandum in support thereof. Oral argument was heard on the pending motions on June 2, 1997. On June 30, 1997, the trial court denied the motion to correct errors and entered a final judgment in favor of the Sheriff.

DISCUSSION AND DECISION

I. JUDGE DEITER

The Newmans argue that the trial court erred in granting Judge Deiter's motion to dismiss. Judge Deiter contends that the trial court correctly determined that he was entitled to absolute judicial immunity; therefore, granting the motion to dismiss was appropriate. We agree with Judge Deiter.

An Ind. Trial Rule 12(B)(6) motion to dismiss tests the legal sufficiency of the complaint. *Right Reason Publications v. Silva*, 691 N.E.2d 1347,1349 (Ind.Ct.App. 1998). When reviewing a T.R. 12(B)(6) motion to dismiss, we view the pleadings in the light most favorable to the non-moving party, and draw every reasonable inference in favor of that party. *Id.*

We will affirm a successful T.R. 12(B)(6) motion when a complaint states a set of facts, which, even if true, would not support the relief requested in that complaint. *Id.* Moreover, we will affirm the trial court's grant of a motion to dismiss if it is sustainable on any theory or basis found in the record. *Id.*

Viewing the facts alleged in the complaint in a light most favorable to the Newmans, the complaint, even if true, does not support the requested relief. It is well-settled that judges are entitled to absolute judicial immunity from suits for money damages for all actions taken in the judge's judicial capacity, unless those actions are taken in the complete absence of any jurisdiction. *J.A.W. v. State,* 650 N.E.2d 1142,1151 (Ind.Ct.App. 1995) *as affirmed by J.A.W. v. State,* 687 N.E.2d 1202,1215 (Ind. 1997). The underlying purpose of the immunity is to preserve judicial independence in the decision-making process. *Id.* Judicial decision-making without absolute immunity would be driven by fear of litigation and personal monetary liability. *Id.*

Nevertheless, the Newmans argue that Judge Deiter acted in absence of any jurisdiction in this matter and, therefore, should be subject to liability. We note that the Newmans' argument that there was a lack of personal jurisdiction over them must fail. The emergency "best interests" hearing was held for their benefit and they personally appeared for that hearing. There is no question that Judge Deiter had jurisdiction over adoption matters. The Newmans also challenge Judge Deiter's jurisdiction in issuing the order granting full faith and credit of the Maryland order. However, we have previously decided this issue finding that Judge Deiter had jurisdiction. *In the Matter of L.C.,* 659 N.E.2d 593,602 (Ind.Ct.App. 1995).

Moreover, the law is clear that a judicial officer will not be deprived of immunity because the action he took was in error, or in excess of his authority. *Stump v. Sparkman,* 435 U.S. 349,356-57, 98 S.Ct. 1099,1104-05, 55 L.Ed.2d 331 (1978), *reh'g denied,* 436 U.S. 951, 98 S.Ct. 2862, 56 L.Ed.2d 795. He will be subject to liability only when he has acted in the clear absence of all jurisdiction. *Id.*

We agree with the Newmans that the Seventh Circuit Court of Appeals' comments about judicial immunity made in passing, in an opinion involving the same factual situation, are not precedent in this case and are dicta. However we find them to be helpful in our resolution of this issue. We agree with the Seventh Circuit Court of Appeals' statement as follows:

> In detaining the Newmans the judge was acting in his judicial capacity, in a matter that was within at least the outer bounds of his jurisdiction; no more is required for the doctrine to apply....Given the ever-present potential for violence in domestic-relations situations, Judge Deiter would have been acting well within the scope of a domestic-relations judge's judicial function had he enjoined the Newmans from returning home until [L.C.] was removed. But as it was midnight when the hearing was held...compliance with the usual formalities attendant upon the issuance of an injunction would not have been practicable. So the judge just told them to stay put. The informality of the proceeding did not destroy the immunity, as is clear from *Mireles v. Waco, supra*, a factually similar case in which the Supreme Court reversed a denial of absolute immunity. (citations omitted).

Newman v. State of Indiana, et al., 129 F.3d 937,941 (7th Cir. 1997).

The Seventh Circuit went on to state as follows:

> It is irrelevant that the judge may have erred or that he may have had an improper motive...Immunity washes out errors, and absolute immunity washes out bad motives.

Id at 942.[3]

The Newmans further assert that the Seventh Circuit's comments are not appropriate authority for this matter because the Seventh Circuit was deciding a § 1983 case and the case at bar is a state tort action. While we agree with their distinction in types of cases, the Newmans' argument is of no moment here. If the judge is acting within his jurisdiction, or even in excess of that jurisdiction absolute judicial immunity applies, regardless of the nature of the cause of action.

The same logic applies to the Newmans' claim that Judge Deiter and the Sheriff conspired to lure the Newmans from their home to the Judge's office for the hearing. First, we note that there is no independent cause of action for a civil conspiracy in Indiana. *See Winkler v. V.G.. Reed & Sons, Inc.*, 638 N.E.2d 1228,1234 (Ind.Ct.App. 1994). But assuming *arguendo* that there was a separate cause of action for civil conspiracy, absolute judicial immunity applies, removing liability from suit.

The Newmans claim that international law provides them with a cause of action against Judge Deiter for false imprisonment regardless of the existence of judicial immunity. They cite to the International Covenant on Civil and Political Rights, G.A.res.2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 52, U.N.Doc. A/6316 (1966), 999 U.N.T.S. 171, as support for that proposition. This is an issue we do not decide. However, even assuming that the treaty applies to this situation and gives the Newmans a cause of action, the treaty would not override judicial immunity.

[3]The Seventh Circuit Court of Appeals issued a warning to the Newmans as follows: We warn the Newmans and their counsel that continued persistence in this quixotic litigation will invite the imposition of sanctions. We note in this connection that Mr. Newman is himself a lawyer. 129 F.3d at 940.

We find no error under any of the theories offered by the Newmans in the trial court's order granting Judge Deiter's motion to dismiss.[4]

II. THE SHERIFF

The trial court decided that the motion for summary judgment submitted by Seigel, Commiskey and the Marion County Sheriff should be granted. The Newmans claim that the trial court erred in granting the motion.

A trial court's decision on a motion for summary judgment enters the process of appellate review clothed with a presumption of validity. *Stephenson v. Ledbetter,* 596 N.E.2d 1369,1371 (Ind. 1992). The party appealing the grant of a motion for summary judgment must persuade the appellate court that error occurred. *Id.*

When reviewing a grant of summary judgment, we use the same standard as applied by the trial court. *Trotter v. Nelson*, 684 N.E.2d 1150,1152 (Ind.1997). Summary judgment should be granted only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* In making our determination, we consider the evidence designated by the parties in a light most favorable to the non-moving party. *Id.* Any doubt about a fact or inference is resolved in favor of the non-moving party. *Id.*

Where material facts conflict, or undisputed facts lead to conflicting material inferences, summary judgment is inappropriate. *Butler v. City of Indianapolis*, 668 N.E.2d 1227,1228 (Ind. 1996); Ind.Trial Rule 56(C). This is true even if the court believes the non-moving party will not succeed at trial. *Dague v. Fort Wayne Newspapers, Inc.*, 647 N.E.2d 1138,1140 (Ind.Ct.App. 1995), *trans. denied.* Summary judgment should not be used as an abbreviated trial. *Watters v. Dinn*, 633 N.E.2d 280,285 (Ind.Ct.App. 1994).

[4]The State argues that the judge would be entitled to immunity from suit under the Indiana Tort Claims Act, Ind.Code §34-13-3-1 *et seq.* However, we choose to decide this issue under the theory of absolute judicial immunity.

The trial court must enter summary judgment if designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Rosi v. Business Furniture Corporation*, 615 N.E.2d 431,434 (Ind.Ct.App. 1993). An appellate court is prohibited from reversing summary judgment orders on the ground that there is a genuine issue of material fact unless material facts and relevant evidence were specifically designated to the trial court. *Id.*

The Newmans raise several issues regarding the Sheriff's conduct as it relates to the meeting in their home prior to the emergency hearing and in the judge's office after the emergency hearing. Among the Newmans' arguments that summary judgment was inappropriate are the following: 1.) that the Sheriff had discretion with respect to the enforcement of Judge Deiter's orders, thereby destroying judicial immunity, 2.) that the Sheriff was not enforcing Judge Deiter's orders, but was acting in furtherance of the alleged conspiracy of which the Sheriff and Judge Deiter were co-conspirators, 3.) that the order they challenge was Judge Deiter's oral order to temporarily detain the Newmans in his office until execution of his removal order had been completed, and that because the order was oral, the content of the order is unknown to them and thus, inappropriate for summary judgment, 4.) that there is a dispute over material facts, because the Sheriff, in its motion for summary judgment argued that the facts were undisputed for purposes of summary judgment only, while pleading disagreement over some facts in its answer, 5.) that the writ of assistance issued by Judge Deiter did not comply with normal procedures for contempt, thereby rendering the Sheriff's actions illegal, 6.) that the Newmans made no admissions in their response to the Sheriff's request for admissions, and 7.) that since the International Covenant on Civil and Political Rights allegedly creates a cause of action in the Newmans which supersedes any judicial immunity, immunity cannot absolve the Sheriff of liability.

A detailed discussion and resolution of many of these

arguments is unnecessary because of our determination that Judge Deiter is afforded absolute judicial immunity for his actions in this matter. We note that many of the arguments presented above do not relate to the issue of appropriateness of summary judgment, but rather invite us to determine issues alleged in the Newmans' complaint. Therefore, we decline to determine those issues, and focus instead on the designated evidence which was before the trial court on the issue of summary judgment and the appropriateness of the trial court's determination.

We have held that absolute judicial immunity extends to persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune. *J.A.W.*, 650 N.E.2d at 1151-52. Moreover, we have held that the act of executing or enforcing a court order is a function intrinsically associated with judicial proceedings. *Id.*, at 1152. Moreover, a non-judicial officer who acts in furtherance of a valid court order cannot be deprived of immunity. *Id.* In addition, we have held that a sheriff who detains an individual for an extended period of time solely as a result of a judge's order is still entitled to judicial immunity from a claim of false imprisonment. *Grant County Commissioners v. Cotton*, 677 N.E.2d 1103,1105 (Ind.Ct.App. 1997).

Accepting all of the statements in the Newmans' complaint as true, which would be to construe all genuine issues of material fact in a light most favorable to the Newmans, the non-moving party, summary judgment was appropriate. The evidence discloses that the Sheriff was acting in furtherance of Judge Deiter's order to temporarily detain the Newmans while the removal order was being executed. The absolute judicial immunity afforded Judge Deiter properly extended to the Sheriff for those acts in furtherance of the judge's orders. The trial court did not err.

III. BISHOP

The Newmans allege that the trial court committed

reversible error in granting Bishop's motion to dismiss. Bishop contends that the trial court correctly determined that his motion to dismiss should be granted.

We note that the Newmans allege that they have sufficiently pleaded causes of action against Bishop which should survive a motion to dismiss for failure to state a claim upon which relief could be granted. However, the Newmans have failed to cite cogent authority setting forth what the elements of the various claims are and how the complaint sets forth facts which would support those claims. *See Armstead v. State*, 538 N.E.2d 943,945 (Ind. 1989); *See* Ind. Appellate Rule 8.3(A)(7). Waiver notwithstanding, we will address the Newmans' complaint as it relates to Bishop's conduct.

The Newmans alleged in Count I of their complaint that Bishop breached a contract with the Newmans. Bishop argued at the hearing where his motion to dismiss was considered that there in fact was no contract between him and the Newmans. The Newmans conceded that there was no valid claim against Bishop for breach of contract. Therefore, the trial court did not err in granting the motion to dismiss as to this count.

In Count II of their complaint, the Newmans alleged that Bishop breached a fiduciary duty to them. Our supreme court has held that a fiduciary relationship exists between attorney and client, making it necessary for the attorney to act in the utmost good faith. *Sanders v. Townsend*, 582 N.E.2d 355,358 (Ind. 1991).

We have searched the Newmans' complaint and have found no allegation that an attorney-client relationship ever existed between the Newmans and Bishop. In fact, the allegations state that Bishop was an attorney for CBI and was hired by WCDSS to pursue full faith and credit of the foreign order. The allegations state that the Newmans were clients of CBI. We note, in passing, that by the time the adoption proceedings had begun and enforcement of the removal order was sought, the Newmans' relationship with CBI had

deteriorated to the point that if any relationship existed, it was indeed an adversarial one. Further, the Newmans had retained their own counsel. The trial court did not err in granting the motion to dismiss as to Count II.

Count III of the Newman complaint alleges that Bishop interfered with the Newmans' contractual rights with WCDSS. Bishop's name is mentioned in the opening and closing paragraphs of the complaint, however, the Newmans fail to allege any conduct on Bishop's part relating to this claim.

In order to recover under the claim of tortious interference with a contractual relationship five elements must be shown. *Winkler*, 638 N.E.2d at 1235. Those elements are: 1.) the existence of a valid and enforceable contract, 2.) the defendant's knowledge of the existence of the contract, 3.) the defendant's intentional inducement of breach of the contract, 4.) the absence of justification, and 5.) Damages resulting from the defendant's wrongful inducement of the breach. *Id.*

As stated above, we can find no allegations in the record which indicate Bishop's involvement in interfering with the Newmans' contractual rights. The trial court properly granted Bishop's motion to dismiss as to Count III.

Counts IV and Counts V of the Newmans' complaint allege that Bishop violated the Newmans' right to privacy and committed defamation, libel and slander against the Newmans. In addition to failing to cite to any authority to support the Newmans' argument that their complaint does state a claim against Bishop, the Newmans failed to make any argument in support of these claims during the hearing on the motion to dismiss. However, we will consider the Newmans' arguments below.

Again, we have searched the Newmans' complaint for any allegations involving Bishop's conduct which could establish a violation of the Newmans' right to privacy, defamation, libel, or slander. We find no allegations in that regard. Bishop was not involved in the preparation or release of the materials

alleged to be libelous or defamatory. Neither are there facts to indicate that Bishop made statements which would constitute slander. In fact, there is no reference made to conduct by Bishop at all. The trial court did not err in granting Bishop's motion to dismiss Counts IV and V.

Count VIII of the Newmans' complaint alleges that Bishop was involved in a civil conspiracy to violate the Newmans' right to privacy, to interfere with the Newmans' adoption contract with WCDSS, to defame, libel and slander the Newmans, and to falsely imprison the Newmans. The trial court granted Bishop's motion to dismiss. We agree with the trial court.

We previously stated that in Indiana there is no independent cause of action for civil conspiracy. *See Winkler*, 638 N.E.2d at 1234. Moreover, the only allegation made with regard to Bishop's conduct is that he opposed the Newmans' attempt to obtain a stay of Judge Deiter's removal order. This allegation is not sufficient to withstand a motion to dismiss. The trial court correctly dismissed this count against Bishop.

CONCLUSION

The trial court correctly found that Judge Deiter was entitled to absolute judicial immunity from liability under the Newmans' complaint. Further, the trial court correctly granted the Sheriff's motion for summary judgment on the basis that the absolute judicial immunity from liability extended to those non-judicial officers acting in furtherance of Judge Deiter's orders. Finally, the trial court correctly granted Bishop's motion to dismiss.

Affirmed.

RUCKER, J., and SHARPNACK, C.J., concur.

APPENDIX B

217 STATE HOUSE
INDIANAPOLIS, IN 46204

BRIAN BISHOP
CLERK OF THE INDIANA SUPREME COURT,
COURT OF APPEALS AND TAX COURT

(317) 232-1930
FAX (317) 232-8365

Cause Number
49A04-9710-CV-00448
Lower Court Number:
49D059605CP717

NEWMAN, LAWRENCE T., -V- DEITER, CHARLES J.

You are hereby notified that the SUPREME COURT has on this day 5/17/99

THIS MATTER COMES BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER FROM A DECISION OF THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 11(B). THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS, THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS WHICH WERE SUBMITTED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON THE APPEAL IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR AA

WITNESS my name and the seal of said Court,
this 17th day of MAY, 1999

s/ Brian Bishop
Clerk Supreme Court, Court of Appeals and Tax Court

APPENDIX C

STATE OF INDIANA
COUNTY OF MARION

MARION SUPERIOR COURT
CIVIL DIVISION, 5
CAUSE 49D05-9605-CP-717

LAWRENCE T. NEWMAN, ET AL.
Plaintiffs,

vs.

STATE OF INDIANA, ET AL.
Defendants.

ENTRY AND ORDER OF DISMISSAL

This cause came before the Court for hearing and argument on November 25, 1995 (sic), on Defendant Judge Charles Deiter's Motion to Dismiss. The Court having considered the Motion, having reviewed the briefs submitted by the parties, and heard oral argument, now finds that the Defendant Judge Deiter is entitled to judicial immunity from suit.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that all counts in this complaint against Judge Deiter are dismissed, with prejudice.

DATED: 12/9/96 /s David L. Rimstidt
Judge, Marion Superior Court

APPENDIX D

STATE OF INDIANA
COUNTY OF MARION

MARION SUPERIOR COURT
CIVIL DIVISION, 5
CAUSE 49D05-9605-CP-717

LAWRENCE T. NEWMAN, ET AL.
Plaintiffs,

vs.

STATE OF INDIANA, ET AL.
Defendants.

MEMORANDUM DECISION

This matter came before the court on the Defendants Christopher Siegel (sic), Paul Commiskey (sic) and Sheriff of Marion County's Motion for Summary Judgment. The court having examined the submission of the parties now enters the following decision.

FACTS

For the purpose of this motion all facts in the plaintiffs' complaint are taken as true. The following facts adopted from the defendants' brief are not in dispute: On May 27, 1994, the Newmans were the subject of an order from Marion County Superior Judge Charles J. Deiter, ordering them to surrender Laura Gayle (sic) Rachel Clem to the Worchester (sic) County Department of Social Services by delivering her to the Office of the Children's Bureau of Indianapolis by 2:00 p.m. on May 27, 1994. The Newmans anticipated that officers of the Marion County Sheriff's Department would come to their

home to execute Judge Deiter's Order. At 5:50 p.m. on May 27, 1994, Judge Deiter executed a Writ of Assistance which included, *inter alia*, that "any and all force necessary, including incarceration" may be used to obtain the child. Additionally, the Writ also authorized the Sheriff to "arrest any person and bring him to (sic) her to this Court to show cause why he or she should not be punished for contempt, and to hold such person until Court is in session."

At approximately 10:00 p.m., Defendants Christopher Siegel and Paul Commisky, agents of the Marion County Sheriff, came to the Newmans' home. Siegel stated that he had only come to the house to talk to the Newmans. Siegel spent approximately one hour in the home discussing the situation. At approximately 11:00 p.m., Siegel suggested telephoning Judge Deiter at his office to arrange an "emergency (best interest) hearing," at which the Newmans could present Judge Deiter with their claims of illegalities committed by various other Defendants in this action. Siegel and the Newmans' attorney, Russell L. Jones, then had a telephone conversation with Judge Deiter. After Judge Deiter agreed that he would stay his order until after the "emergency hearing," the Newmans left their home, along with Siegel and Jones. The hearing was held in Judge Deiter's office, Judge Deiter was not wearing his robe, there was no court reporter, and the media was prohibited from the hearing. Siegel did not attend the hearing, despite a request to do so by Beverly Newman.

After approximately 45 minutes, Judge Deiter announced that he was ordering the Sheriff's Deputies to the Newmans' home to take Laura Clem, and that the Newmans were not allowed to leave his office until this was accomplished. Judge Deiter ordered Marion County Sheriff's Deputies to guard the inner entrance of his office so that the Newmans could not leave his office. Judge Deiter also ordered additional Marion County Sheriff's Deputies to guard the outer entrance to his office. The Sheriff's Deputies refused to permit the Newmans to leave Judge Deiter's office under orders of Judge Deiter.

Marion County Sheriff's Deputies then executed Judge Deiter's order and removed Laura Clem from the Newmans' home.

All actions alleged to have been taken by Defendants Siegel, Commisky and other Sheriff's Deputies were on the direct orders of Judge Charles Deiter. Plaintiffs' Response to Defendants' Request for Admissions, Exhibit A. On December 9, 1996, this Court granted Defendant Judge Deiter's motion to dismiss, finding that he is entitled to judicial immunity. Exhibit C.

OPINION

The standard for summary judgment is well known. Summary judgment is properly granted only when the evidentiary matter designated to the trial court shows that there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Ind.Trial Rule 56C; *Briggs v. Finley*, 631 N.E.2d 959,963 (Ind.Ct.App. 1994), trans. denied. The burden is on the moving party to prove that there are no genuine issues of material fact and that they (sic) are entitled to judgment as a matter of law. *Landau v. Bailey*, 629 N.E.2d 264,266(Ind.Ct.App. 1994), reh'g denied. By admitting for the sake of this motion that all facts are true, defendants need only show that they are entitled to judgment as a matter of law. Defendants assert three basis (sic) of law in support of their motion. The court believes that upon one basis the defendants are entitled to judgment as a matter of law. This court has previously ruled that the actions of Judge Deiter were cloaked with judicial immunity. These defendants contend that said immunity also affords them protection. Indiana law does extend judicial immunity to those who assist in the implementation of judicial orders. In *J.A.W. v. State*, 650 N.E.2d 1142 (Ind.App. 1995) the court noted:

> The same policies which underlie the grant of absolute judicial immunity to judges justify the grant of immunity to non-judicial officers who perform quasi-judicial functions. *Id.; Ashbrook v. Hoffman*, 617

F.2d 474,476 (7th Cir. 1980). "[A] nonjudicial officer who is delegated judicial duties in aid of the court should not be a 'lightning rod for harassing litigation' aimed at the court." *Ashbrook*, 617 F.2d at 476 quoting *Kermit Const. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1,3 (1st Cir. 1976). Absolute judicial immunity therefore extends to persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune. *Bush v. Rauch, 38 F.3d 842,847 (6th Cir. 1994).*

In the instant case the sheriff's personnel who acted to implement the judge's order are also entitled to immunity.

JUDGMENT

IT IS THEREFORE ORDERED THAT Defendants Christopher Siegel, Paul Commiskey and Sheriff of Marion County's Motion For Summary (sic) be Granted and that there is no just reason to delay final entry of judgment.

IT IS FURTHER ORDERED THAT final judgment be entered in favor of defendants Christopher Siegel, Paul Commiskey and sheriff of Marion County's (sic) and against the plaintiffs.

IT IS FURTHER ORDERED THAT THE CLERK OF MARION COUNTY, in accordance with Indiana Trial Procedure Rule 72, immediately upon the entry of this ruling, shall serve a copy of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and shall make a record of such mailing. Such mailing is sufficient notice for all purposes for which notice of the entry is required by these rules; but any party may, in addition, serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

Monday, June 30, 1997

s/ Steven R. Eichholtz
Steven R. Eichholtz, Judge
Marion Superior Court
Civil Division 5